

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ST. LUKE'S MEMORIAL HOSPITAL, INC.

and

Case No. 24-CA-9271

UNIDAD LABORAL DE ENFERMERAS
Y EMPLEADOS DE LA SALUD (ULEES)

Shecyl San Miguel, Esq. & Ephraim Vega, Esqs.,
for the General Counsel.
Jose Olivares Gonzalez, Esq., for the Respondent.
Harold Hopkins, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. A trial in this matter was held on March 11 and 12, 2003, in Hato Rey, Puerto Rico, following the filing of an unfair labor practice charge on May 7, 2002¹ (subsequently amended on May 15, and August 28) by Unidad Laboral de Enfermeras y Empleados de la Salud (herein the Union or ULEES), and issuance of a complaint on September 25, by the Regional Director for Region 24 of the National Labor Relations Board (the Board). The complaint alleges that the Respondent, St. Luke's Memorial Hospital, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating and maintaining an unlawful no-solicitation/no-distribution policy, and by selectively and disparately enforcing that policy against Union representatives who sought access to its cafeteria for solicitation and distribution purposes. By answer dated October 7, the Respondent denies engaging in any unlawful conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Puerto Rico corporation with an office and place of business in Ponce, Puerto Rico, is an acute health care institution engaged in providing in-patient and out-patient medical care and related services. During the year preceding issuance of the complaint, the Respondent's gross revenues exceeded \$250,000, and, in the course conduct of its operations, it purchased and received at its Ponce facility goods valued in excess of \$50,000 directly from points and places outside the Commonwealth of Puerto Rico. The Respondent

¹ All dates are in 2002, unless otherwise indicated.

admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Factual background

The Respondent, formerly known as José A. Gándara Hospital, was, prior to June 2000, owned and operated by the Puerto Rico Department of Health. In or around July 2000, the Respondent was acquired by, and became associated with, a private health care entity known as Hospital Episcopal San Lucas, and renamed St. Lukes Memorial Hospital.² St. Lukes I was, at the time, party to three separate collective bargaining agreements with the Union covering distinct units of registered nurses, practical nurses, and clerical employees.³ Following its acquisition of St. Lukes II, St. Lukes I transferred several of its departments and the employees working therein to St. Lukes II.⁴ The number of unit employees transferred from St. Lukes I to St. Lukes II during this transition totaled between 50 and 100 employees. Under an agreement entered into between the Respondent and the Union, the transferred unit employees' terms and conditions remained the same as they had been at St. Lukes I, and they continued to be represented by the Union and covered by the collective bargaining agreements that were applicable to them at St. Lukes I.

All three agreements contain an identical provision addressing the visitation rights of union officials to the facilities.⁵ The provision reads as follows:

The officers of the [ULEES] may visit the different branches of the Hospital when they believe that it is necessary during the daytime hours, in order to make certain that the Agreement is complied with or to deal with representatives of the Hospital on issues related to the union members, provided they notify the corresponding Hospital representative in advance about their visit. These visits will be carried out in a way that it (sic) does not interfere with the work performance and complaints will not be discussed in front of patients or visitors of the Hospital.

The record reflects that on August 28, 2000, Respondent's counsel wrote to the Union's

² At the hearing, Hospital Episcopal San Lucas was often referred to as St. Lukes I, and the Respondent, St. Lukes Memorial Hospital, as St. Lukes II. For ease of reference, those same designations will be used here, except that St. Lukes II may, at times, also be referred to as the Respondent.

³ See Charging Party exhibits (CPX)1-3. CPX-1, the agreement covering the registered nurses, and CPX-2, the practical nurses' agreement, were both executed in June 2001, and are effective from January 1, 2000 to December 31, 2003. CPX-3, the clerical employees' contract, was apparently executed in May 1999, and was effective from January 1, 1999 to December 31, 2002.

⁴ Among the departments transferred from St. Lukes I to the Respondent were the delivery and nursery departments, the neonatal intensive care unit (NICU), the OB/GYN department, pediatrics, and the ambulatory surgery department, as well as some clerical and operating room personnel.

⁵ See Art. XXVII, Sec. E of CPX-1(B); Art. XXVI, Sec. E of CPX-2(B); Art. XXIV, Sec. E of CPX-3(B).

Executive Director, Radamés Quiñones, informing him of the recent acquisition of St. Lukes II by St. Lukes I, and describing, inter alia, the agreement reached between the Respondent and the Union regarding the rights of the transferred employees. (See, JX-1[b]). The letter also advised the Union that St. Lukes I maintained a no solicitation/no distribution policy at its facilities consistent with the Supreme Court's holding in *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). It goes on to state that "the distribution of propaganda and/or informative material," or anything of a "written or verbal" nature is not permitted "in those areas of direct care and/or immediate care of the patient." The letter then describes such prohibited areas as including "patients' rooms, hallways, nursing stations, elevators, waiting rooms and/or reception areas, emergency rooms, areas where physicians work and/or family members of the patients are interviewed, x-ray units, or any other area that is for patient access or affects the patient's tranquility and treatment." The Respondent in its letter makes clear that it expects ULEES to adhere to these restrictions, but advises that it was willing to negotiate with the Union in order to find alternative areas where the Union might be free to distribute its literature, citing the cafeteria "(where only employees have access)," the hospital parking entrances, and the employees' parking lot as possible locations. The letter further advises that if an agreement could be reached regarding the use of a "determined area in the cafeteria to distribute informational material, this process cannot be turned into a place to hold meetings," and that the Respondent would retain the right "to qualify and control the use that is given in this specific area."

On October 2, 2000, Respondent's Human Resources director, Isabel Maldonado, sent a letter to Quiñones, describing the procedure the Union was to follow when visiting either St. Lukes I or St. Lukes II in connection with its representative duties.⁷ The procedure described in paragraph 1 of the October 2, letter reads as follows:

All the visits of the representatives of [ULEES] must be notified in advance to the Human Resources Director, and in his absence, to the Executive Director. Whenever possible, we would appreciate that the visits of the ULEES representatives be notified one or two days in advance, in order to coordinate it with the employees that you need to see, so that the work schedules are not severely altered and services to the patients or Hospital operations are not affected. Likewise an advance notice will help us to make the arrangements to get a private place where the ULEES representatives can meet.⁸

Paragraph 8 of that same letter also describes for the Union the Respondent's no distribution policy. Tracking the no-solicitation/no-distribution policy described in the August 28, 2000, letter, it reads as follows:

With regard to the distribution of printed material, the position of the Hospital is that such distribution, literature or discussion of that material may not be done in areas of direct patient care, nor during working hours. Among these areas are the department hallways, nursing stations, patients' rooms, x-ray and other areas of access to patients, among others.

⁶ Despite the August 28, letter's assertion that "only employees have access" to the cafeteria, the cafeteria is open to the general public.

⁷ See Joint Exhibit 2(B).

⁸ The suggestion in paragraph 1 of the October 8, letter, that ULEES should try to notify the Respondent "one or two days in advance" of any visit by a Union official, is not found in the contracts' visitatorial clauses.

Although the above policy, on its face, imposes a ban on the distribution of literature in certain defined patient-care areas of the Hospital, Maldonado testified that the ban extends to all areas inside the Hospital, including the cafeteria (Tr. 175). The Respondent similarly averred, in the first affirmative defense in its answer to the complaint, that it “has a standing order not to allow at its cafeteria distribution of any sort from any party, other than official hospital communications.” In this same vein, Maldonado initially testified that, to the best of her knowledge, no solicitation or distribution has ever occurred inside the cafeteria. However, she subsequently conceded, contrary to her prior testimony and to the Respondent’s claim that only official hospital communications were allowed to be distributed in the cafeteria, that two local newspapers of general interest to the community at large, e.g., *La Perla* and *L’Opinion*, are in fact distributed in the cafeteria. Maldonado explained that the Hospital has, for many years, allowed such local newspapers to be distributed because they contain news and information that was of interest to the public-at-large. (Tr. 177-179).

The incident which gave rise to the instant allegations occurred on or around the first week in April, and involved a visit by Quiñones and another Union official, Ingrid Vega, to the Respondent’s cafeteria.⁹ According to Vega, one of the ways she maintains contact with unit employees is through visits to the medical facilities. She testified that she visited the Respondent between two and three times a week, and that her visits often occurred between 11:00 a.m. and 1:30 p.m. as this was when unit employees generally took their lunch break. The distribution of the Union newspaper and other literature was usually done during that time period. On those occasions when she needed to meet with Maldonado, said meetings took place in the latter’s offices.

Vega testified that it was her practice before visiting the Respondent to first call the Human Resources office and let the secretary, or whoever answered the phone, at times Maldonado herself, know that she would be visiting the hospital either that day or on some other particular date. According to Vega, there were occasions when she tried but was unable to reach someone at the St. Lukes II office. On said occasions, which Vega admits did not occur often, she would leave word at the St. Lukes I Human Resources office of her visit (Tr. 45). Vega testified that on these visits, she generally went directly to the cafeteria somewhere between 11:00 am and 1:30 pm, and that any distribution she had to make took place during that time period. When the visits called for a meeting with the Human Resources director, the meeting was held in the director’s office; when the visit was for the purpose of going to a specific department, the human resources office would have a supervisor accompany Vega through the department. (Tr. 42-43).

In early April, Vega and Quiñones went to the Respondent’s cafeteria to distribute copies of the Union’s newspaper, *El Aguacero*, and of the recently printed nurses’ contracts to unit employees. According to Vega, other nonunion material had previously been distributed in the cafeteria. Consistent with Maldonado’s testimony, Vega recalls seeing *La Perla* newspaper made available for distribution to employees in the cafeteria, and testified to seeing two other general circulation newspapers, *El Nuevo Día* and *El Vocero*, also made available for distribution. Maldonado further recalled seeing, sometime in March, an employee distributing

⁹ Vega is a representative, organizer, and officer of the Union and is responsible for administering the collective bargaining agreements, including handling grievance arbitration matters, at both medical facilities. According to Vega, her duties include distributing *El Aguacero* and other Union literature to unit employees.

flyers advertising "nail polishing" services. Vega testified that before going to the cafeteria, she called the Human Resources office at St. Lukes I at approximately 11:15 a.m., and left word with one of the two secretaries there that she and Quiñones would be visiting the cafeteria at St. Lukes II that morning. (Tr. 48). She explained that this was the procedure established by the collective bargaining agreements and, as noted, consistent with her established practice.

After making her call, Vega and Quiñones arrived at the cafeteria one-half hour later, and spent between 45-90 minutes distributing their literature until confronted by a Hospital security guard. The guard, Vega claims, told her she had to accompany him to Maldonado's office. Vega purportedly agreed to do so and, on arriving at Maldonado's office, was allegedly told by Maldonado that she and Quiñones could not be in cafeteria because they had not given the Respondent the required advanced notice of their visit. According to Vega, she told Maldonado that while it was true she had not informed Maldonado at St. Lukes II of the visit, she had in fact left a message advising of the visit at the St. Lukes I facility. (See, Tr. 53-54).

According to Vega, nothing else was said and she returned to the cafeteria where she continued to distribute union literature and to talk to employees until two local policemen arrived approximately one hour later accompanied by one or two Hospital security guards (Tr. 58). Vega claims that the security guards told her and Quiñones they had to leave. The police officers, she testified, did not approach her but did speak with Quiñones and also informed him that management had requested that he leave the premises. Quiñones, Vega recalls, refused to leave, explaining to the police that under the Union's collective bargaining agreement with the Respondent, Union representatives were allowed to visit the facility. Quiñones purportedly further told the police that they were also allowed into the cafeteria because the cafeteria was open to the general public. Following Quiñones conversation with the police, he and Vega simply left the premises. Vega recalls seeing visitors, physicians, unit employees, and supervisory personnel in the cafeteria during this incident. (Tr. 61) Vega testified that some two or three weeks later, she advised the Respondent's Human Resources department that she wished to visit the cafeteria, but that when she and Union official Jose Costas arrived at the Hospital, they were met by three security guards at the front entrance who denied them entry. (Tr. 63) She further recalled that sometime in June or July, she notified Maldonado that she was planning to visit St. Lucas I, that Maldonado told her she could not do so because of the Board charges (pertaining to the early April visit) that were pending, and that, unless Vega's visit was for the purpose of addressing specific complaints or grievances, she would not be allowed to visit the facilities until Board charges were resolved. Vega claims that from then on, all of the Union-related material, including bulletins, newspapers, and subpoena notices, that had been left in the Respondent's facility were thrown out (Tr. 89). Vega's testimony as to her subsequent encounter with security guards as she tried to enter the Respondent's facility following her April visit, as to her conversation with Maldonado in June or July, and regarding the subsequent discarding by Respondent of Union-related literature, was undisputed and is credited.

Maldonado also testified as to the procedures the Union was required to follow when visiting the Respondent's facilities, and as to the early April cafeteria incident. Regarding the procedure for visits, she testified that typically the Union, usually Vega, calls the Human Resources department and informs her of the visit, and its intended purpose. If the purpose is to meet with employees, then her department affords employees the time needed and place to meet with the Union official.

As to Vega's and Quiñones' early April visit to the cafeteria, Maldonado testified that on the day in question, she was at her St. Lukes I office when she received a call late that morning from Elizabeth George, her secretary at St. Lukes II, advising that Vega and Quiñones were in the Respondent's cafeteria. George, she further claims, also informed her that Quiñones was

making personal negative comments about her (Maldonado) and the Respondent's executive director, Ramon Lopez, and being confrontational with other Hospital personnel. Maldonado concedes, however, that George had not personally witnessed Quiñones' behavior at the cafeteria, and had instead been told of Quiñones' activities by a security guard, Lieutenant Gonzalez, and by St. Lukes II facilities supervisor, Domingo Colon. (Tr. 190-191). Maldonado's description of the information she purportedly received from George does not, it should be noted, include any mention by George of Quiñones giving a speech or holding an employee rally in the cafeteria. According to Maldonado, after receiving the information from George, she inquired of the four secretaries in the St. Lukes I Human Resources office if Vega had notified any of them of her visit, and all four denied receiving any such call. (Tr. 229).

Maldonado claims that following George's phone call, she called Colon and Gonzalez and directed them to remove Vega and Quiñones from the premises. She purportedly also called Hector Rivera, the head of environmental affairs at the facility, as well as Lopez, to update him on what was going on. She recalls telling Lopez that Vega and Quiñones had not given the Respondent prior notice of their visit and that, consequently, she had issued instructions to have them removed from the Hospital premises (Tr. 234). Although initially citing only the failure to give prior notice of the visit as the reason for having Vega and Quiñones ejected from the Hospital premises, on further questioning from me, Maldonado altered her response by adding that Quiñones' conduct in the cafeteria, which she described as a "crisis," was also a factor in her decision to have them expelled. (Tr. 234-235).

Maldonado could not recall if, prior to calling Colon, she inquired of her staff at the St. Lukes II Human Resources office whether Vega had given it prior notice of her visit. Further, while she claims to have asked the staff at the St. Lukes I office if Vega had notified them of her visit, she could not recall if this latter inquiry occurred before or after she directed Colon to evict Vega and Quiñones from the Respondent's cafeteria. (Tr. 224). After calling these individuals, Maldonado testified she headed over to St. Lukes II and, on arriving, went straight to Lopez' office where she and Lopez spent several hours discussing numerous topics, including Vega's and Quiñones' visit to the cafeteria (Tr. 168).

Maldonado denies Vega's claim that the two met personally that day, and instead testified that she and Vega only spoke on the phone. Thus, she testified that Vega called her around noontime, while she was still meeting with Lopez in the latter's office, to inform that the Hospital's security guards were asking her to leave, and also apologized for not having notified Maldonado in advance of her visit. Maldonado purportedly replied that she, Vega, definitely needed to leave the hospital premises. Maldonado admits she never personally went to the cafeteria to investigate the incident. Maldonado claims that at some point, she gave instructions to Colon and/or Rivera, both of whom were in the cafeteria at her direction, to call the local police because Quiñones was refusing to leave the cafeteria unless the police were called. Maldonado purportedly chose not to investigate the incident herself because she feared Quiñones "aggressive attitude." (Tr. 202-203).

Colon testified to receiving a call in early April from Maldonado at around 12:40 pm asking him to look into Vega's and Quiñones activities in the cafeteria. Colon claims that on arriving at the cafeteria, he observed Quiñones giving a speech on how the Respondent was "fooling the people," and that a security official, Lieutenant Gonzalez, was trying to get Quiñones to lower his voice by telling him that there were patients in the area. Colon claims he too got involved in trying to get Quiñones to lower his voice. Vega denies that Quiñones gave a speech in the cafeteria that day. Colon claims that at one point, when he approached Quiñones, the

latter asked him who he was, and he proceeded to identify himself to Quiñones. Quiñones, according to Colon, then took Colon's picture over the latter's objection.¹⁰ At one point, Quiñones, Colon claims, called him a "charlatan" and stated he could not understand how "the administration could count on someone like" Colon. Colon then left the cafeteria to call Maldonado and update her on what was transpiring, and thereafter presumably returned to the cafeteria. He claims that he in fact called Maldonado on several occasions to inform her of what was going on, and that, on the last call, told Maldonado that the police had arrived, that everything had calmed down, and that Quiñones and Vega had left the facility.

Although Gonzalez did not testify, Colon claims the latter at one point asked Quiñones to leave the cafeteria, but that Quiñones declined to do so unless the police were called. He testified that some five minutes later, the police were called. On their arrival, Gonzalez, according to Colon, explained to the police that Quiñones had been giving a speech and had failed to follow the proper procedure for visiting the Hospital. The police, however, declined to take any action because Vega and Quiñones were calm at the time and not doing anything. (Tr. 277). Quiñones, according to Colon, left either during or shortly after the police officer's conversation with Gonzalez. Colon claims that he spent about thirty-five minutes in total in the cafeteria during this incident, and that, during that period, he did not see either Vega or Quiñones handing out Union literature.

Called by the Respondent, Eduardo Mercado, a messenger at St. Lukes II, testified that he was in the cafeteria for about five or ten minutes around noontime on the day in question, and, during that period, heard Quiñones say in a loud voice that the funds that were intended to cover employee benefits were instead being given to Maldonado and Lopez. Mercado recalls seeing other co-workers, as well as nurses, physicians, and cafeteria personnel, in the cafeteria at the time the incident occurred. Although claiming that Quiñones was speaking somewhat loudly in the cafeteria, Mercado never claimed to have seen or heard Quiñones making a speech or conducting a rally.

I am not convinced that Quiñones made a speech or conducted a rally in the cafeteria during his early April visit, as claimed by the Respondent on brief. While Maldonado and Colon testified that he did, Vega, contrary to the Respondent's further assertion on brief, denies that Quiñones engaged in any such conduct.¹¹ Except for the brief period of time when Maldonado purportedly summoned her from the cafeteria, Vega was in the cafeteria and had first hand knowledge of what transpired therein. Maldonado, on the other hand, never went to the cafeteria and had no direct knowledge of Quiñones' activities.¹² Although Colon did testify to

¹⁰ Vega explained that Quiñones brought a camera with him that day to take photos of unit employees receiving copies of their collective bargaining agreements and that the photos were to be included in the Union's newspaper.

¹¹ The Respondent's claim, on brief at pages 4 and 7 (fn. 5), that Vega admitted on cross-examination that Quiñones "made a speech" during the early April visit to the cafeteria is patently wrong and misleading, for when asked by Respondent's counsel on cross-examination if Quiñones made a speech that day, Vega twice stated clearly and unambiguously that he had not (Tr. 121).

¹² Maldonado, as noted, claims that the information she received about Quiñones' activities came from George who, in turn, purportedly received the information from security guard Gonzalez and Colon. Neither George nor Gonzalez were called to testify, and while Colon did testify, he made no mention in his testimony of having seen or spoken with George regarding this incident. In fact, Colon's testimony suggests that he first learned of Vega and Quiñones being in the cafeteria when Maldonado called him and asked him to look into the matter.

Continued

having seen Quiñones giving a speech in the cafeteria, Mercado, as noted, made no such claim in his testimony, and testified only that Quiñones was being loud. Having considered the above conflicting testimony, I am persuaded that while Quiñones may have been speaking somewhat loudly, he did not give a speech or engage in a rally. I note in this regard that, according to Colon, the police felt it unnecessary to take any action because neither Quiñones nor Vega were engaging in any inappropriate conduct when they arrived.

B. Discussion

The complaint, as noted, alleges, the General Counsel contends, and the Respondent denies that its ejection of Vega and Quiñones from the Hospital's cafeteria in early April was unlawful and in violation of Section 8(a)(1) of the Act. The Respondent on brief raises two principal defenses to the allegation, both of which I find lack merit. First, the Respondent contends that Vega and Quiñones were lawfully evicted from its premises because they did not provide the Respondent with advance notice of their visit. Second, it argues that its actions were justified because Vega's and Quiñones' distribution of Union literature violated its no-solicitation/no-distribution policy.

As to the Respondent's claim that it did not receive prior notice of the Union's early April visit, Vega, as noted, testified that she, in fact, called the St. Lukes I Human Resources office prior to her visit and left word with a secretary that she and Quiñones would be visiting the St. Lukes II cafeteria that morning. Her claim in this regard was not seriously challenged by the Respondent. The only contrary evidence on this question came from Maldonado who, as noted, testified that she inquired of the secretaries at the St. Lukes I office and that all denied receiving any such call from Vega. None of the secretaries, however, was called to corroborate Maldonado's claim in this regard. As for Maldonado, she was not a particularly credible witness. Her rather vague and ambiguous testimony on whom she may have called, and what she may have done or been told, following her receipt of George's call, was full of contradictions and is simply not worthy of belief. The inconsistency between her claim at the hearing that George described to her what Quiñones was doing in the cafeteria, and the admission in her sworn affidavit that George made no such statements to her, further undermines her overall credibility.

Vega on the other hand came across as more reliable and sincere than Maldonado. Her claim, therefore, of having given the Respondent prior notice of her early April visit, and her version of what transpired between her and Maldonado during her visit, is credited. The Respondent's assertion on brief, that a two-day advance notice from the Union was required for any such visit, is without merit, for neither the October 2, letter it sent to the Union and on which it relies to support its assertion, nor the notice provision in the parties' collective bargaining agreement, contains any such requirement. Rather, as described above, both the October 2, letter and the notice provision in the contract state only that advance notice should be given without specifying the amount of advance notice expected or required.¹³

Colon's testimony, if true, makes patently clear that he could not have reported to George that Quiñones was giving a speech in the cafeteria, as claimed by Maldonado. Maldonado's claim, therefore, that George learned that Quiñones was speaking ill of her and Lopez in the cafeteria from Gonzalez and Colon, is uncorroborated and, indeed, somewhat inconsistent with Colon's own testimony. Accordingly, Maldonado's testimony regarding what she was told by George is found not to be credible.

¹³ Although the October 2, letter states that the Union should, "whenever possible," give "one or two days" advance notice of a visit, it is patently clear from the above "whenever possible" language that the "one or two day" notice was more of a suggestion to the Union

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Regarding its claim that Vega and Quiñones were lawfully evicted under its no-solicitation/no-distribution policy,¹⁴ the Respondent, on brief, correctly points out that under *Lechmere v. NLRB*, 502 U.S. 527 (1992), an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property unless the employees are otherwise inaccessible, *Id.*, at 534, a factor it contends, and I agree, is not present here. This, however, does not end the inquiry, for there is another long-established exception, which the Respondent does not mention, to an employer's right to restrict access to its property, e.g., a "nondiscrimination" exception. Under this latter exception, an employer may not discriminate by refusing to allow a union to distribute literature on its premises while allowing similar distribution or solicitation by nonemployee entities other than the union. *NLRB v. Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956); *Price Chopper*, 325 NLRB 186, 187 (1997), *enfd.* *Four B Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. (1998)).¹⁵ I agree with the General Counsel's claim on brief that the "nondiscrimination" exception is applicable here.

The record evidence makes patently clear, and the Respondent on brief concedes as much, that the distribution of nonunion literature, e.g., local newspapers, has long been allowed in the Hospital cafeteria. Maldonado admitted as much in her testimony, with corroboration from Vega. Vega also testified, credibly and without contradiction, to having observed, one month prior to her and Quiñones' April visit, an employee soliciting and distributing literature for a nail-polishing business in the cafeteria, establishing to my satisfaction that the solicitation and distribution of other literature of a nonunion, non-work related nature also occurs. It is also patently clear, and the Respondent does not contend otherwise, that these past incidents of solicitation and distribution in the cafeteria do not fall within either of the previously-cited

rather than a requirement. As noted, this "one or two day" language is not found in the notice provision of the parties' agreement. There is no evidence here to suggest, nor does the Respondent contend, that a 2-day advance notice was an established practice of which the Union was aware and to which it had acquiesced. In fact, Vega's testimony is to the contrary, for she testified that she generally called the Respondent between 15 minutes to one hour before making any such visit (Tr. 72-73). I credit her testimony in this regard.

¹⁴ As previously described, the no-distribution policy in the October 2, 2000 letter to the Union bans the distribution of literature "in areas of direct patient care," and includes "department hallways, nursing stations, patients' rooms, x-ray and other areas of access to patients, among others." The cafeteria is not included in the list of areas where distribution of literature is prohibited, suggesting the possibility that the ban on distribution of literature does not extend to the cafeteria. Nor does the cafeteria qualify as a "direct patient care" area. As such, a ban on the solicitation and distribution of literature in the cafeteria, absent a showing that the ban is needed to avoid a disruption of patient care, may very well be unlawful under the *NLRB v. Baptist Hospital* holding referenced by the Respondent in its August 28, 2000, letter. The complaint, however, does not allege the Respondent's no-distribution policy, as set forth in the October 2, 2000, letter to be unlawful. Rather, the allegation here is that the Respondent has applied its no-distribution policy in a disparate and discriminatory manner. Accordingly, I make no finding regarding the actual validity of the Respondent's no-solicitation/no-distribution policy.

¹⁵ The "nondiscrimination" rule is itself subject to two exceptions. Thus, an employer's refusal to allow union solicitation will not violate the Act if the nonunion solicitations it has allowed consist only of a small number of "isolated beneficent acts," or are relate "to the employer's business functions and purposes." *Four B. Corp. v. NLRB*, *supra* at 1183; *Albertson's*, 332 NLRB 1132, 1135 (2000); *Sandusky Mall Co.*, 329 NLRB 618, 621 (1999); *Hammerly Mfg. Corp.*, 265 NLRB 57, n. 4 (1982).

exceptions to the “nondiscrimination” rule (see footnote 15 supra). The Respondent’s refusal in early April, therefore, to allow Vega and Quiñones to distribute Union material in its cafeteria, when it has allowed other nonunion material to be distributed, was, I find, discriminatory and a violation of Section 8(a)(1) of the Act.

I further agree with the General Counsel that the Respondent’s rule requiring that the Union give it two-days prior notice before visiting the cafeteria further violates Section 8(a)(1) of the Act.¹⁶ There is in this regard no evidence to indicate, and the Respondent does not contend, that this two-day advance notice requirement applies to other members of the public who may wish to enter and use its cafeteria. The imposition of such a two-day notice requirement on the Union officials alone constitutes disparate treatment solely on the basis of Union affiliation, and interferes with the employees’ Section 7 right to freely meet with their representatives. The two-day prior notice requirement is therefore discriminatory and, as noted, violative of Section 8(a)(1).

Conclusions of Law

1. The Respondent, St. Luke’s Memorial Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Unidad Laboral de Enfermeras y Empleados de la Salud (ULEES) is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring Union representatives to provide two-days advance notice before visiting the cafeteria while imposing no such requirement on other visitors to the cafeteria, and by prohibiting Union representatives from distributing literature in the cafeteria while allowing the distribution of other nonunion material, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent violated Section 8(a)(1) of the Act , it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER¹⁷

The Respondent, St. Luke’s Memorial Hospital, Inc., Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁶ Although, as previously discussed, neither the collective bargaining agreement, nor the October 2, letter to the Union, contains any such two-day prior notice requirement, the Respondent, as noted, has taken the position that the Union is required to give it two days notice before visiting the cafeteria or any other area of the Hospital.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discriminatorily enforcing its no-solicitation/no-distribution policy by prohibiting representatives of the Union, Unidad Laboral de Enfermeras y Empleados de la Salud, from distributing its literature in the Hospital cafeteria and directing them to leave the cafeteria, and by calling the police to have them removed.

(b) Discriminatorily requiring the Union to notify it two-days advance before visiting the Hospital cafeteria.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Ponce, Puerto Rico copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C.

George Alemán
Administrative Law Judge

¹⁸ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discriminatorily enforce our no-solicitation/no-distribution policy against representatives of the Union, Unidad Laboral de Enfermeras y Empleados de la Salud by refusing to allow them to distribute Union material in the cafeteria, asking them to leave, and calling the police to have them ejected, and **WE WILL NOT** discriminatorily require that the Union notify us two days in advance before visiting the cafeteria.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SAINT LUKE'S MEMORIAL HOSPITAL, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002, San Juan, PR 00918-1002

(787) 766-5347, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.